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Supreme Court, U.S.
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No. 95-382

In The

Supreme Court of the United States

October Term, 1995

TODD SHIPYARDS CORPORATION, AETNA CASUALTY & SURETY CO.,

Petitioners,

vs.

DORIS JEAN HOKE, (WIDOW OF TRUBY LEE HOKE), DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT DORIS JEAN HOKE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The question raised by the petition is more appropriately framed as follows:

I. Did the United States Court of Appeals for the Ninth Circuit err in its determination that the Administrative Law Judge erred in his application of the law to the facts.

II. Did the United States Court of Appeals for the Ninth Circuit rule correctly in determining that based on the facts of this case the Petitioner did not overcome the presumption under section 20(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 920(a) that the decedent was killed in the course and scope of his employment by Todd Shipyards Corporation.

LIST OF PARTIES

The following are parties to this proceeding:

Doris Jean Hoke
Claimant-Respondent

Todd Shipyards Corporation
Employer-Petitioner

Aetna Casualty and Surety Company[1]
Insurance Carrier-Petitioner

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Director, Office of Workers' Compensation Programs, United States Department of Labor,
Party-in-Interest

THE AETNA CASUALTY AND SURETY COMPANY[2]

1. The parent Corporation of The Aetna Casualty and Surety Company is Aetna Life and Casualty Company.

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[1] See page iii. In compliance with Rule 29.1 of the Supreme Court of the United States.

[2] In compliance with rule 29.1 of the Supreme Court of the United States.

LIST OF PARTIES – Continued

2. The affiliate companies of The Aetna Casualty and Surety Company (which are also first tier subsidiaries of The Aetna Casualty and Surety Company, wholly and non-wholly owned) are:

Aetna Life Insurance Company
The Standard Fire-Insurance Company
Aetna Life Insurance and Annuity Company
Aetna International, Inc.
Aetna (U.K.) Holdings Ltd.
Aetna International, Inc.
Aetna International (Australia) Pty. Limited
Aetna International (N.Z.) Limited
Aetna Life Insurance Company of Illinois
ACS Financial Services, Inc.
ACS Portfolio Services, Inc.
Luettgens Limited
AE Housing Corp.
Structured Benefits, Inc.
AE Four, Incorporated
Aetna Life & Casualty International Finance N.V.
Span Data Processing Center, Inc.
5th Generation, Inc.
Aetna Foundation, Inc.
AE Ten, Incorporated
AE Fifteen, Incorporated
Arcelia Limited
Aetna Realty Investments 1, Inc.

3. Subsidiaries of The Aetna Casualty and Surety Company (wholly owned and non-wholly owned) are as follows:

The Aetna Casualty and Surety Company of Illinois
The Aetna Casualty and Surety Company of America

LIST OF PARTIES – Continued

The Aetna Casualty and Surety Company of Connecticut
The Aetna Commercial Insurance Company
The Aetna Excess and Surplus Lines Company
Farmington Casualty Company
The Aetna Lloyds of Texas Insurance Company
Urban Diversified Properties, Inc.
Farmington Holdings, Inc.
Aetna Financial Services, Inc.
Ponderosa Homes
Axia Services, Inc.
AFF, Inc.
AE Development Group, Inc.
Aetna Opportunity Corporation
AE Investments, Inc.
The Aetna Casualty and Surety Company of Canada
Aetna National Account U.K. Limited
AECC, Inc.
Executive Risk Management Associated
Executive RE, Inc.
Aegan International, Inc.
Parklake Associates
Northlake Centre Associated
Central Trust Centre Associates
211 East Ontario Associates
TAAS Associates
Aetna/Aerea Corporation

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DECISION BELOW

The Memorandum Decision, and Order denying a rehearing of the United States Court of Appeals for the Ninth Circuit (Petitioner's Appendix page App.1) was not reported. The Memorandum Decision, and Order of the United States Court of Appeals for the Ninth Circuit (Petitioner's Appendix pages App.2-App.5) was not reported.

The Decision and Order of the Benefits Review Board (Petitioner's Appendix pages App.6-App.14) was not reported.

The Decision and Order Denying Benefits of the Administrative Law Judge (Petitioner's Appendix pages App.15-App.23) was reported at 20 BRBS 235.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES PRESENTED FOR REVIEW

The statutes presented for review are adequately set forth in the Petition.

ATTORNEYS' FEES

§ 28 of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 928 (hereinafter LHWCA), provides that a person seeking benefits within the Act who utilizes the services of an attorney at law in the successful prosecution of his claim shall be awarded, in addition to his award or compensation, reasonable attorney's fees against the employer or carrier in an amount approved by the Deputy Commissioner, Board or Court. Respondent requests that should she obtain a favorable determination in this Court that an attorney's fee be awarded to William H. Shibley for representation in this matter before this Court, and that this matter be remanded so that attorney's fees might be awarded his representation before the Board, the ALJ, and the Deputy Commissioner, as well for representation in this matter.

STATEMENT OF THE CASE

On June 2, 1982, the decedent, TRUBY LEE HOKE, punched out of work between 4:01 and 4:06 p.m. That day, he had apparently proceeded out of the front gate of employer's guarded premises to a parking lot controlled, maintained and operated by respondent TODD SHIPYARDS CORPORATION, located approximately 400 to 500 yards away, where he had parked his van that morning. At approximately 5:00 p.m., while fixing a tire on his van in his employer's parking lot, he was shot and killed for unknown reasons. The shooting was reported to the Los Angeles Police Department at 5:05 p.m. on June 2, 1982. Although two men were tried for his death, none

were convicted and the motives, if any, for the decedent's being shot and killed are unknown.

At the time of his death, the decedent was married to and residing with the respondent Doris Jean Hoke, having married him on February 19, 1977, and had two minor children of that marriage, Felicia, born December 5, 1970, and Truby Lee Hoke, Jr., born May 5, 1974. He supported his wife and minor children.

Prior to his death, the decedent had described the dangerous nature of the Todd Shipyards Corporation's employee parking lot to his wife. In that lot, illicit drugs and fighting were commonplace. That lot was enclosed, surrounded by a fence with a watch tower for a guard to use, although there was no guard present.

Although the respondent does not know why her husband was shot and killed, she was told by a police officer that it had been a robbery.

ARGUMENT

1. This case is not of sufficient import to warrant a grant of certiorari.

The issue presented in this case is unique to its facts and nothing stated nor argued by the Petitioner herein, will convert this case to one warranting review on certiorari.

There is no conflict with other decisions of this Court; there is no conflict between the circuits; nor does

this case involve a constitutional question or an important statutory question.

There are almost no reported cases involving a shooting death under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950. The Ninth Circuit's decision states:

> The employer had the responsibility to rebut the presumption that the LWHCA covered Mrs. Hoke's claim by providing substantial evidence that Mr. Hoke's death did not arise out of nor occur in the course of his employment there. Because Todd Shipyards offered no *admissible evidence* that Mr. Hoke was not within the usual and ordinary scope of employment while preparing to leave the worksite, the petition is GRANTED and the case is REMANDED to the director. [emphasis added].

It is obvious that the Ninth Circuit reviewed the evidence and determined that as a matter of law the weight, sufficiency and credibility given the evidence submitted by the Petitioner at the trial of the underlying matter before the Administrative Law Judge was so incompetent and unreliable as to not deserve any weight. In the Ninth Circuit's view the "evidence" offered by the employer was so inconsequential as to neither be admissible in a proceeding under the LHWCA nor be able to overcome the presumption set forth in 33 U.S.C. § 920(a) by substantial evidence.

2. The decision of the Court of Appeals for the Ninth Circuit that the presumption set forth in § 20(a) of the Act, 33 U.S.C. § 920(a), has not been overcome by substantial evidence was correct.

The respondent is entitled to the presumption under § 20(a) of the Act, 33 U.S.C. § 920(a) that, if, in fact, a prima facie case has been proved. The § 20(a) presumption mandates that, "It shall be presumed, in the absence of substantial evidence to the contrary, (a) that the claim comes within the provisions of the Act." This presumption arises and an award can be supported by substantial evidence unless the employer offers substantial convincing evidence that the injury was not employment related. *Bell Helicopter v. Jacobs*, 746 F.2d 1342 (8th Cir. 1984). A prima facie case can be supported by medical evidence (the coroner's report) that the decedent died on the company premises. *Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98. The Act, in effect, eases the ordinary preponderance of the evidence standard applicable in most civil cases to protect the rights of employees and their families. In *Arrar v. St. Louis Shipbuilding Co.*, 780 F.2d 19, 20 (8th Cir. 1985), the court held that even the testimony of a participant to an alleged altercation was insufficient to overcome the presumption set forth in § 20(a) of the Act, 33 U.S.C. § 920(a), that the claim comes within the provisions of the Act, 33 U.S.C. § 903(a). In this case, the respondent's exhibits and the undisputed facts make out a prima facie case that the decedent sustained an injury arising out of and occurring during the course of his employment.

In his opinion and decision, the ALJ stated, " . . . I do not find that the death of employee arose out of or, for that matter, in the course of his employment. Additionally, a willful act by an assailant must be directed at decedent because of his employment in order to bring such an injury within the coverage of the Act." The ALJ then cites several cases which stand for the proposition that where an intentional act is directed against an employee for reasons unrelated to this employment, the injury resulting therefrom would not arise out of the employment. Unfortunately, in this case there is not a shred of competent evidence as to why the decedent was shot and killed.

The determination of the ALJ in the case at bar was that, " . . . [T]he exact motive of the assailant or assailants in the case at hand remains unknown, at least on the instant record. It may be safely assumed, however, that the motive was robbery, as this is consistent with the police report of the event, and there is no solid evidence to suggest the contrary. But, be that as it may, there is not even a suggestion that the violent assault, whatever the motive, somehow arose out of the victim's employment with Todd." That determination violates the presumption, and the beneficent purpose of the statute. In effect, that decision states that since the ALJ does not know what the cause of the altercation was, the claimant did not meet her burden of proof rather than that the employer rebutted the presumption by substantial evidence.

The ALJ also ruled that there was substantial evidence to show that there was no causal relationship to establish that the attack and resultant death did not occur

in the course of an activity related to decedent's employment. This decision was affirmed by the Board which stated it was supported by substantial evidence. The unfortunate problem is that there is no evidence as to why the decedent was shot and killed, and no evidence whether or not any of those arrested and ultimately acquitted were employees of Todd Shipyards Corporation.

In *Parsons Corporation v. Director*, 619 F.2d 38 (9th Cir. 1980), the Court of Appeals discussed the statutory presumption and the burden of proof in longshore cases. The court provided guidance stating: "Substantial evidence as used in the Act 'is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ' [citations omitted]. The statutory presumption in the Act may be overcome by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment. [citations omitted]." It is suggested and the Ninth Circuit held that the ALJ applied the incorrect standard. Furthermore, *Parsons, supra,* states that even after the substantial evidence is produced to rebut the statutory presumption, the employer still bears the ultimate burden of persuasion. This decision suggests that the test used by both the ALJ and the Board in this case was improper.

The insistence by the Board and by the ALJ that the respondent had not proven a causal relationship between the employment and the resultant shooting is ill-founded. The presumption has not been rebutted by any evidence of substance. The only "evidence" submitted by the employer is the hearsay upon hearsay and rank speculation of a private investigator, Mike Madigan, who

allegedly talked to the investigating police officer, and the testimony of Raymond H. Courtois, the then manager of Worker's Compensation for Todd Shipyards. Neither of those witnesses offered substantial evidence to rebut respondent's claim.

Larson, *Workers' Compensation Law*, Volume 1A, Section 29.10, discusses the "quantum theory" of work connection. Larson suggests that the "course of employment" and "arising out of employment" test are not, and should not be, applied independently; they are both parts of a single test of work connection, and, therefore, deficiencies in the strength of one factor are sometimes allowed to be made up by the strength in the other factor. In this case, the claimant was shot and killed in the parking lot of the employer while attempting to leave his employment which under the law is in the course of his employment. Professor Larson indicates in his aforementioned work,

> Here the course of employment test is satisfied beyond the slightest doubt: The employee is in the midst of performing the active duties of his job. But the causal connection is very weak, since the source of the injury, whether a stray bullet, a wandering lunatic, an unexplained fall or death, or a mistaken assault by a stranger, is not distinctly associated with employment conditions as such, and is tied to the employment only by the argument that the injury would not have occurred to this employee but for the obligation of the employment which placed him in the position to be hurt. Yet, since this 'course' element is so strong, awards are becoming increasingly common on these facts.

Larson, *Workers' Compensation Law*, Volume 1A, Section 29.10, page 5-442. It is suggested that an appropriate decision would have been to find that the shooting and death arose out of the decedent's employment at Todd Shipyards, and occurred in the course of his employment.

3. The Ninth Circuit correctly determined that the decedent Hoke was injured in the course and scope of his employment.

In the case at bar, the decedent was shot a short time after walking out of the front gate of Todd Shipyard in an enclosed company parking lot which had a guard tower but no guard present on the date of the incident.

As can be seen, a company parking lot is part of the employment premises. Professor Larson defines "premises" at Section 15.41 and 15.42(a) of his treatise. In Section 15.42(a), the basic parking lot rule is discussed.

> As to parking lots owned by the employer, or maintained by the employer for his employees, the great majority of jurisdiction considered them part of the "premises," whether within the main company premises or separated from it.

As can be seen, parking lots have been constantly found to be part of the employment premises as was decided by the Board in this case. See, e.g., *Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1947); *Perkins v. Marine Terminals Corporation*, 673 F.2d 1079 (9th Cir., 1982).

Furthermore, injuries to employees who are attempting to go to or leave work are compensable. This Court

has indicated that injuries occurring on or near the employment premises, which occur during a period when the employee is attempting to go to work or leave work, are compensable. *Bountiful Brick Company v. Giles,* 276 U.S. 154 (1928), held:

> And employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the expressed or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the expressed or implied consent of the employment.

It is suggested that based on the time and the location of the incident, the injury arose out of and in the course of the decedent's employment.

In *Marra Bros. v. Cardillo*, 154 F.2d 357 (C.C.A. 3d Cir. 1946), William H. Reilly, the deceased employee, was a hatch foreman employed by Marra Brothers, Inc. His gang had been laid off at noon on February 22, 1942, and when he learned of his gang's being laid off he went to the ship foreman to find out why. After that conversation, he was seen walking towards the ship his gang had worked on and was last seen alive at a point about 10 feet from the ship. On March 12, 1942, his body was discovered on board the ship. An autopsy showed that he had fractures of both temple bones, of the left lower jaw, of seven ribs and of the right clavicle. That court held that to avoid the payment of compensation, the employer would have had to prove by substantial evidence that the injury did not arise out of or in the course of his employment. It is suggested that that is the case here as well. The employer has submitted no evidence and the decision of the ALJ is not supported by any evidence that shows that Truby Hoke's death was otherwise.

As is suggested by *Parsons Corporation v. Director*, supra, at 41, "The rule follows from the overall humanitarian statutory policy [of the Act] that all doubtful questions of fact be resolved in favor of the injured employee." In this case since the employer's evidence is almost non-existent, the proper decision would have been to have found coverage and awarded benefits to the respondent.

It is suggested, therefore, that the shooting and killing of Truby Lee Hoke was compensable and that the

decision of the Court of Appeals for the Ninth Circuit is correct and certiorari should be denied.

CONCLUSION

As can be seen this case was properly decided by the Court of Appeals for the Ninth Circuit. Therefore, the writ should be denied and that attorney's fees and costs be awarded pursuant to § 28 of the Act, 33 U.S.C. § 928.

Respectfully submitted,

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